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SUPREME COURT, U. S.

No. 73-460

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In the Supreme Court of the United States

OCTOBER TERM, 1973

DONALD TROISE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The issue presented is whether the trial court should have declared a mistrial because of testimony, immediately excluded, that petitioner refused to identify himself to customs agents as the owner of a boat, later found to contain marijuana.

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession with intent to distribute 613 pounds of marijuana, in violation of 21 U.S.C. 841(a)(1). He was sentenced to two and one-half years' imprisonment. The court of appeals affirmed (Pet. App. I).

The facts are set forth in the opinion of the court of appeals (Pet. App. I). Briefly, they are as follows: Based on reliable information and surveillance, unchallenged here, U.S. Customs Agents stopped an automobile, which was towing a boat on a trailer. Smelling a strong odor of marijuana, the agents searched the boat and found marijuana.

During the prosecutor's direct examination of one of the customs agents, the following colloquy occurred (Pet. App. I 5):

> Q. After you observed the occupants of the car get out, what did you next have occasion to observe?
>
> A. Well, at this moment I, after everyone had got out, I asked who owned the boat, who owned the car, who owned the trailer. No one replied.

This was immediately followed by an objection which was sustained. The jury was instructed to disregard the agent's response (Pet. App. I 6, n. 2). Petitioner's contention that the court's caution and instruction were insufficient to cure the the prejudicial effect the remark had on the minds of the jurors was properly rejected in the opinion of the court of appeals, upon which we rely.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[1] See also *Frazier* v. *Cupp*, 394 U.S. 731, where it was held that the court's limiting instructions were sufficient to protect defendant's rights. There the prosecutor summarized in his opening statement to the jury the expected testimony of a co-defendant who had pleaded guilty but decided later not to testify. The cases cited by petitioner (Pet. 5) are inapposite. *United States* v. *Mullings*, 364 F. 2d 173 (C.A. 2), did not involve the adequacy of a curative instruction, but merely the improper admission of highly prejudicial evidence to show that a statement, which had been taken in violation of the defendant's Fifth Amendment rights, was falsely exculpatory. *United States* v. *Semensohn*, 421 F. 2d 1206 (C.A. 2), was also a case in which no curative instruction was given regarding testimony that the defendant declined to answer questions when questioned by the F.B.I. (421 F. 2d at 1209-1210). That error combined with improper comment regarding petitioner's prior record—which was not rendered harmless by an inadequate curative instruction—required a reversal of the conviction.